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## Florida Statutes Section 627.727: Is the Statutory Right to Reject Uninsured Motorist Coverage Really a “Right” At All?

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# Florida Statutes Section 627.727: Is the Statutory Right to Reject Uninsured Motorist Coverage Really a “Right” At All?

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## **Abstract**

In 1961, Florida joined the ranks of the growing majority of states to mandate uninsured motorist coverage. This legislation resulted from consumer outcry over the numerous hardships befalling accident victims injured by uninsured motorists.

**KEYWORDS:** motorist, coverage, uninsured

# Florida Statutes Section 627.727: Is the Statutory Right to Reject Uninsured Motorist Coverage Really a “Right” At All?

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## I. Introduction

In 1961, Florida joined the ranks of the growing majority of states to mandate uninsured motorist coverage. This legislation resulted from consumer outcry over the numerous hardships befalling accident victims injured by uninsured motorists. The Florida uninsured motorist statute requires that an uninsured motorist endorsement be issued with all liability insurance policies for the protection of persons injured by financially irresponsible motorists.<sup>1</sup> The statute, now designated section 627.727, does afford the insured the right to reject the uninsured motorist coverage.<sup>2</sup> However, unless the insured knowingly rejects the uninsured motorist protection, the insurer is deemed to provide this coverage regardless of whether an extra premium is actually paid.<sup>3</sup>

Despite the obvious good intentions of this legislation, the Florida uninsured motorist statute has been beset with problems from its inception. In particular, the insureds' statutory right to reject has produced extensive litigation on the issue of what constitutes a valid rejection. In such cases, insurers generally claim that the insured has rejected the coverage. Policy holders, on the other hand, maintain that they were never offered this protection or never effectively rejected it. The statute provides no guidelines in this area whatsoever, and the courts have struggled to be just in deciding the continual flood of uninsured motorist cases.

The ability of this statute to protect consumers has been rendered highly questionable in light of certain practices of the insurance industry, the naivete of insureds, and the marked confusion in the Florida courts. Insurers do not favor uninsured motorist protection, as evi-

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1. FLA. STAT. § 627.727 (Supp. 1982). The uninsured motorist statute was originally enacted as section 627.0851, but, in 1970 was changed to the current section number. FLA. STAT. § 627.727 (Supp. 1970).

2. FLA. STAT. § 627.727 (Supp. 1982). *See* Appendix for entire text of the statute.

3. FLA. STAT. § 627.727 (Supp. 1982). *See, e.g.,* *Weathers v. Mission Ins. Co.*, 258 So. 2d 277 (Fla. 3d Dist. Ct. App. 1972).

denced by their use of policies slanted toward discouraging such coverage, their failure to adequately explain the protection, and their attempts to exclude or limit the coverage as much as possible. The frequently mistaken assumptions of insureds regarding the nature and scope of uninsured motorist coverage further compound the problem. As presently applied, the "right" of rejection is really no right at all, but merely a means utilized by the insurance industry to escape the mandatory inclusion of uninsured motorist coverage in auto liability policies. Florida courts have been reluctant to aggressively address these various problems, apparently preferring purely legislative reform. The latest legislative response was the Sunset Act of 1982 which amended Florida Statutes section 627.727 by requiring that the rejection of this coverage be in writing.<sup>4</sup> This requirement, however, is but one step toward clarifying the uncertainties surrounding the statutory right of rejection. The legislature and the courts of Florida must work together to develop standards and policies to effectuate the intent of this statute, and help rather than hinder those parties suffering from the negligence of financially irresponsible motorists.

This note examines the statutory development of uninsured motorist coverage in Florida and focuses specifically on various trouble spots concerning the statutory rejection. The purpose of this note is to demonstrate the seriousness of this situation and to offer specific guidelines to help clarify the vagueness of this subject.

## II. Origin of Uninsured Motorist Coverage

In the prosperity following World War II, the manufacture and sale of automobiles was considerably expanded. Not surprisingly, there was a rise in auto accidents contemporaneous with the increased number of vehicles on the nation's highways. Unfortunately, the innocent accident victim was often virtually without remedy where a tortfeasor neither carried insurance nor possessed sufficient assets to discharge his obligations arising from his tort liability.<sup>5</sup>

Although this problem became increasingly evident during the

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4. FLA. STAT. § 627.727(1) (Supp. 1982).

5. See generally 3 R. LONG, THE LAW OF LIABILITY INSURANCE, § 24.01-24.05 (revised ed. 1983); P. PRETZEL, UNINSURED MOTORISTS 1-5 (1972); 2 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 23.01 (revised ed. 1983); A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 3-17 (1970); Donaldson, *Uninsured Motorist Coverage*, 34 INS. COUNCIL J. 57 (1967).

1940s and 1950s, it had nevertheless existed since the advent of the automobile many years earlier. The initial legislative response consisted of the enactment of financial responsibility laws.<sup>6</sup> These laws, enacted as early as 1925, typically required a motorist to establish proof of future financial responsibility following an auto accident or face revocation or suspension of his driving privileges.<sup>7</sup> The inadequacy of these laws soon became evident: they allowed the irresponsible motorist one "free" accident, and left the victim of the first accident without compensation. For the next thirty years, state legislatures attempted to formulate methods to resolve the inequities in the financial responsibility scheme. Various forms of insurance legislation engineered to compensate those injured by uninsured motorists proved unsatisfactory as the numbers of uninsured motorists escalated in the post World War II era. Increasing pressure was imposed upon state legislatures to implement further remedial measures.<sup>8</sup> Suggested solutions included compulsory insurance laws, unsatisfied judgment funds, and state-sponsored compensation funds. The insurance industry was vehemently opposed to such reforms and actively lobbied against them.<sup>9</sup> These pronounced efforts "to prevent 'further socialization of insurance' and government intervention" was most noticeable in the 1953-54 debates in the New York legislature.<sup>10</sup>

By 1954, the New York legislature had gained recognition as the nation's focal point on the financially irresponsible motorist problem. The insurance industry feared the precedential effect New York's resolution might have on the rest of the country and for almost a year succeeded in stymieing the passage of a compensatory automobile insurance program. Nevertheless, the industry was undoubtedly aware that this was not a problem that would bury itself and that compulsory automobile insurance might soon become a reality. Thus, after a year-long deadlock in the legislature, the insurance industry introduced a new endorsement to the standard auto liability policy.<sup>11</sup> Through the proposed endorsement offered on an optional basis, insureds would be

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6. See *supra* note 5.

7. *Id.* Connecticut was the first state to enact such a law. 1925 Conn. Pub. Acts ch. 183 (repealed 1927). New Hampshire followed this lead and passed a similar law one year later. 1926 N.H. Laws ch. 54.1.

8. See *supra* note 5.

9. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 11 (1970).

10. 3 R. LONG, THE LAW OF LIABILITY INSURANCE, § 24.04 at 24-7 (revised ed. 1983).

11. See *supra* note 9, at 12, 13.

indemnified for losses perpetrated by uninsured motorists. If an insured was without fault and injured he would be compensated when the tortfeasor was either uninsured, underinsured, or a hit-and-run driver.<sup>12</sup> The majority of states adopted this form of coverage although, only two years following these debates, New York enacted a compulsory insurance requirement.<sup>13</sup> In subsequent years, the National Bureau of Casualty Underwriters made this coverage, commonly known as Uninsured Motorist Coverage or Family Protection Insurance, available throughout the United States.<sup>14</sup> State legislation has made the coverage mandatory in almost all jurisdictions, but often the insured is granted the statutory option to reject the coverage.<sup>15</sup>

In light of the significant amount of litigation in this area, the fact that the insurance industry itself created and promoted this type of uninsured motorist coverage should be kept in mind.<sup>16</sup> The insurance industry was wary that consumer-backed legislation might adversely affect its prosperity, and thus devised this new coverage to appease the appetites of concerned legislatures. Over the years it has become apparent that uninsured motorist protection has neither gained favor nor been encouraged by the industry and insurers continually attempt to deny or curtail this coverage through manipulation of statutory vagueness. The problems that this statutory vagueness has spawned are illustrated in the remainder of this note. The Florida legislature's response is examined in the following section.

### III. Florida Legislative History

Case law has served to flesh out the ambiguities and inadequacies that have appeared and often reappear in the amendments to the uninsured motorist statute. The Florida legislature has responded by taking a piecemeal approach in trying to remedy the various controversies as they arise. The legislature has complacently withheld pronouncement on those uninsured motorist issues receiving attention in the courts until a legislative response is absolutely imperative. This section explores the substantive legislative amendments affecting uninsured motorist coverage and illustrates the legislature's somewhat tedious, step-by-step

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12. 12-A G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 45:620 (2d ed. 1981).

13. A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* 14 (1970).

14. *Id.* at 14, 15.

15. *Id.* at 127-129.

16. *Id.* at 16, 17.

approach in developing answers to uninsured motorist problems.

In 1961, Florida Statutes section 627.0851 introduced uninsured motorist coverage in Florida by providing that no automobile liability insurance would be delivered or issued for delivery in Florida unless coverage was "provided therein or supplemental thereto, in not less than the limits described in section 324.021(7) . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles."<sup>17</sup> The statute also provided that this required coverage would be inapplicable if any insured named in the policy rejected the coverage.<sup>18</sup> The 1961 law, less than one-half the length of the present statute, left many areas of uninsured motorist coverage statutorily undefined. Although the statute granted the insured the right to reject the protection, it was silent as to the elements and form of the rejection. Furthermore, the statute contained no provisions regarding the available amounts of coverage in excess over the statutory minimum or the applicability of the coverage requirements to renewal policies. In the years to follow legislative amendments focused on these areas.

In 1963, Florida Statutes section 627.0851 was amended to further provide that, absent a written request by the insured, uninsured motorist protection need not be provided in or made supplemental to a renewal policy if the named insured had previously rejected the coverage in an earlier policy issued by the same insurer.<sup>19</sup> Thereafter, a steady increase in litigation concerning uninsured motorist coverage renewal policies resulted, peaking in the late 1970s and early 1980s.<sup>20</sup>

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17. FLA. STAT. § 627.0851 (1961). This act was effective July 1, 1961. Florida Statutes section 324.021(7) referred to in the statute is the Florida Financial Responsibility Law. In 1961, it required proof of financial responsibility in the amount of \$10,000 for bodily injury or death to one person, \$20,000 for the injury or death of two or more persons, and \$5,000 for injury to or destruction of property to others.

18. FLA. STAT. § 627.0851(1) (1961).

19. 1963 Fla. Laws ch. 63-148.

20. The conflict involving renewal policies arose when the insured added a vehicle or replaced or substituted a vehicle. A new rejection was not required unless there was a material change in the policy. However, courts often found that changes constituted material differences making a new rejection necessary. *See, e.g., Hartford Accident & Indem. co. v. Sheffield*, 375 So. 2d 598 (Fla. 3d Dist. Ct. App. 1979). In *Hartford*, the insurer issued the insured a liability policy with the minimum limits, at which time she executed a written rejection of uninsured motorist coverage. Near the end of the policy period the insured complained of high premiums. The insurer responded by offering to change the policy limits due to the legislature's intervening amendment lowering the minimum limits. The insured executed a policy change request and was is-

The confusion arose because the district courts were not uniform in their determinations of what constituted a renewal policy. The 1980 amendment halted the extensive litigation on this subject by expanding this exception to encompass any policy that extends, changes, supercedes, or replaces any existing policy.<sup>21</sup>

sued a second policy without being offered, or rejecting, the uninsured motorist protection. Subsequently, the insured was injured and the issue arose as to whether the second policy was a renewal or a new policy. The court relied on *United States Fire Ins. Co. v. Van Iderstyne*, 347 So. 2d 672 (Fla. 4th Dist. Ct. App. 1977), in holding that it was not a renewal policy because of differences in premium and coverage. The *Van Iderstyne* court had held that an endorsement to a policy adding an automobile for an additional premium was a "separate and severable contract" requiring a new offering of uninsured motorist coverage. *Id.* at 673. *Cf.* *State Farm Mut. Auto. Ins. Co. v. Glover*, 202 So. 2d 106 (Fla. 4th Dist. Ct. App. 1967). Thus *Hartford* established the test that "if the original policy has been changed in any material respect then the policy is new rather than a renewal." *Spaulding v. American Fire & Indem. Co.*, 412 So. 2d 367, 371 (Fla. 4th Dist. Ct. App. 1981) (quoting *Hartford Accident & Indem. Co. v. Sheffield*, 375 So. 2d 598 (Fla. 3d Dist. Ct. App. 1979)). In situations involving replacements or substitutions of vehicles the trend was to follow *State Farm Mut. Auto. Ins. Co. v. Bergman*, 387 So. 2d 494 (Fla. 5th Dist. Ct. App. 1980), *petition for rev. denied*, 394 So. 2d 1151 (Fla. 1981), *per curiam aff'd*, 408 So. 2d 1043 (Fla. 1982), which held that once an insured rejected full coverage under the uninsured motorist portion of a policy he need not reject such coverage again when he buys a replacement vehicle. *See United States Fidelity and Guar. Co. v. Waln*, 395 So. 2d 1211 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. denied*, 407 So. 2d 1106 (Fla. 1981); *Kenilworth Ins. Co. v. McCormick*, 394 So. 2d 1037, 1039 (Fla. 1st Dist. Ct. App. 1981). Applying the *Hartford* test, such a policy change was not considered material and the policy was merely a "renewal" rather than a "new" policy. *Waln*, 395 So. 2d at 1214.

The results were not as consistent in cases involving additions of vehicles. There was a divergence of authority between the Fourth District and the other districts. The Fourth District Court of Appeal relied on *Van Iderstyne*, *Hartford*, and *Waln*, and held that an addition of automobiles with a commensurate increase in premiums constituted a material change and therefore was outside the renewal exception of the statute. *Spaulding v. American Fire & Indem. Co.*, 412 So. 2d 367, 370-371 (Fla. 4th Dist. Ct. App. 1981), *modified*, 8 Fla. L. W. 479 (Dec. 9, 1983) (No. 62,267). *See also* *Kobert v. Zarem*, 437 So. 2d 730 (4th Dist. Ct. App. 1983). The First District rejected *Van Iderstyne* and held that the addition of a vehicle by endorsement is not the issuance of a new policy. *Maxwell v. United States Fidelity & Guar. Co.*, 399 So. 2d 1051, 1053 (Fla. 1st Dist. Ct. App. 1981). The Fifth District followed *Maxwell* in *Sentry Ins. A Mut. Co. v. McGowan*, 425 So. 2d 98 (Fla. 5th Dist. Ct. App. 1982). *See also* *Rhodes v. Aetna Casualty & Sur. Co.*, 437 So. 2d 155 (Fla. 2d Dist. Ct. App. 1983); *Cote v. American Fire & Casualty Co.*, 433 So. 2d 590 (Fla. 2d Dist. Ct. App. 1983).

21. 1980 Fla. Laws ch. 80-396. *See* House Comm. on Insurance, Bill Analysis on Uninsured Motorists Coverage, House Bill 1175 (sponsored by Rep. Gallagher) (April 17, 1980); stating that once enacted, this amendment would effectively overrule



It was not until ten years after the enactment of the original statute that a provision specifying maximum coverage limits was added. Unfortunately, the language adopted by the legislature was susceptible to two interpretations regarding the actual amounts of the limits. Consequently, the courts had to wrestle with yet another ambiguity in the statute.<sup>22</sup> This 1971 amendment required minimum coverage in an amount that was set forth in the financial responsibility law and also required coverage be provided "in an amount up to one hundred percent (100%) of the liability insurance purchased by the named insured for bodily injury."<sup>23</sup> Thus, the required limits were raised to 100% of the bodily injury limits and the named insured could reject the entire coverage or a portion thereof. Furthermore, the amendment provided that a long term lessee who is named insured in a policy or on a certificate of a master policy issued to the lessor shall have the sole right to

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*Hartford.*

22. 1971 Fla. Laws ch. 71-88 stated in part:

No automobile liability insurance . . . shall be delivered or issued for delivery in this state . . . unless coverage is provided therein or supplemental thereto, in not less than limits described in 324.021(7), and in amount up to one hundred percent (100%) of the liability insurance purchased by the named insured for bodily injury. . . .

After the 1971 Act went into effect, courts found the new coverage requirements ambiguous as to the amount of coverage an insured was actually entitled to unless rejected. The problem was in determining the meaning of the phrase "in an amount up to." In *Garcia v. Allstate Ins. Co.*, 327 So. 2d 784, 786 (Fla. 3d Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 422 (Fla. 1977), the court interpreted these terms as providing a minimum (the financial responsibility limits) and a maximum (the bodily injury limits). However, the majority of courts in construing the statute as a whole, held that it provided uninsured motorist coverage *equal* to the bodily injury limits absent an offer or rejection. *First State Ins. Co. v. Stubbs*, 418 So. 2d 1114 (Fla. 4th Dist. Ct. App. 1982), *petition for rev. denied*, 426 So. 2d 26, 29 (Fla. 1983); *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978); *Riccio v. Allstate Ins. Co.*, 357 So. 2d 420 (Fla. 3d Dist. Ct. App. 1978); *Allstate Ins. Co. v. Baer*, 334 So. 2d 135 (Fla. 3d Dist. Ct. App. 1976). To construe the amendment otherwise, noted Judge Anstead concurring in *Lumbermen's*, would create no change in the statute "other than to impose a limitation on the amount of such insurance that could be written." *Lumbermen's*, 355 So. 2d at 445. Furthermore, this interpretation would "be completely contrary to the legislature's action in requiring uninsured motorist coverage in all policies written in Florida and would pose serious constitutional questions." *Id.* Arguably, in retrospect this interpretation was correct: the 1973 amendment clarified the coverage requirements which conform to the holdings of the majority.

23. 1971 Fla. Laws ch. 71-88.

reject the uninsured motorist coverage.<sup>24</sup>

Two years later, the legislature amended the coverage requirements; obviously in response to the frustration courts were experiencing in interpreting the meaning of the coverage requirements as set forth in the 1971 statute. Under the 1973 statute the language was simplified; the amendment required coverage not less than the limits of the liability insurance purchased and also provided that the named insured could select lower limits.<sup>25</sup>

Many uninsured motorist statutes contain provisions for the purchase of optional uninsured motorist coverages which are in excess of the standard limits. In 1976, Florida adopted such a provision. Prior to the amendment, the insurer had to offer uninsured motorist coverage at least equal to the bodily injury limits. Effective October 1, 1976, the insurer was required to make available "limits up to \$100,000. each person, \$300,000. each occurrence, irrespective of the limits of the bodily injury liability purchased"<sup>26</sup> at the written request of the insured.

24. 1971 Fla. Laws ch. 71-88 states in part:

where a vehicle is leased for a period of one (1) year or longer and the lessor of such vehicle by the terms of the lease contract provides liability coverage on the leased vehicle in a policy wherein the lessee is a named insured or on a certificate of a master policy issued to the lessor, the lessee of such vehicle shall have the sole privilege to reject uninsured motorist's coverage. . . .

*See Padron v. H.W.G. Leasing, Inc.*, 436 So. 2d 983 (Fla. 3d Dist. Ct. App. 1983); *Liberty Mut. Ins. Co. v. Dwyer*, 421 So. 2d 587 (Fla. 3d Dist. Ct. App. 1982), *petition for rev. denied*, 431 So. 2d 989 (Fla. 1983); *Midland Ins. Co. v. Hochberg*, 394 So. 2d 449 (Fla. 3d Dist. Ct. App. 1981), *petition for rev. denied*, 402 So. 2d 611 (Fla. 1981).

The 1971 statute limited "uninsured motorist and insolvent insurers coverage to the excess over and not duplicative of benefits available from those liable for the accident, auto liability, or medical coverage, or from workers compensation." Staff of Senate Comm. on Insurance, Staff Analysis on Automobile Liability Insurance; Senate Bill 225, companion to House Bill 276, (sponsored by Sen. Thomas). *See also* 1971 Fla. Laws ch. 71-88.

25. 1973 Fla. Laws ch. 73-180. The statute was not retroactive. *Allstate Ins. Co. v. Baer*, 334 So. 2d 135 (Fla. 3d Dist. Ct. App. 1976).

26. 1976 Fla. Laws ch. 76-266 read:

(2) The limits of uninsured motorist coverage shall not be less than the limits of bodily injury liability insurance purchased by the named insured or such lower limit complying with the company's rating plan as may be selected by the named insured, but in any event, the insurer shall make available, at the written request of the insured, limits up to \$100,000 each person, \$300,000 each occurrence, irrespective of the limits of bodily injury liability purchased, in compliance with the company's rating plan.

From the time of the passage of the 1963 amendment creating the renewal exception to the mandatory coverage requirement until 1980, the courts attempted to decipher the difference between a new and a renewal policy. The results during this seven-year period were highly inconsistent. Apparently, the legislature concluded that this matter could not be resolved in the courts and thus included in the 1980 amendment a provision which by its very terms served to clarify the legislative intent as to the treatment of renewal policies. Prior to this amendment, coverage need not have been provided in or supplemental to a renewal policy. This act further extended this exception to apply to "any other policy which extends, changes, supersedes, or replaces an existing policy issued to him by the same insurer."<sup>27</sup> Furthermore, effective October 1, 1980, the insurer was required to notify the named insured annually of his options as to the statutorily required coverage. Notice was to be part of the premium and "shall provide for a means to allow the insured to request such coverage and shall be given in a manner approved by the Department of Insurance."<sup>28</sup>

The most recent legislation on uninsured motorist coverage was the Sunset Act of 1982.<sup>29</sup> Three substantive changes affecting Florida Statutes section 627.727 were made. Most importantly, this amendment introduced the requirement that rejections of uninsured motorist coverage must be in writing.<sup>30</sup> This provision is another legislative re-

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27. 1980 Fla. Laws ch. 80-396. For a discussion on the case law development which led to the passage of this amendment see *supra* note 20.

28. 1980 Fla. Laws ch. 80-396. See *Ferrigno v. Progressive Am. Ins. Co.*, 426 So. 2d 1218 (Fla. 4th Dist. Ct. App. 1983).

29. 1982 Fla. Laws ch. 82-243.

30. *Id.* at 627.727(1). The requirement of a written rejection of uninsured motorist coverage is clearly in response to the extensive litigation concerning whether an oral or written rejection was required. In 1978, the First District, in *Glover v. Aetna Ins. Co.*, 363 So. 2d 12 (Fla. 1st Dist. Ct. App. 1978), held that an oral rejection of uninsured motorist coverage was sufficient due to the absence of any statutory requirements as to its specific form. The court noted that although the State Insurance Department had issued Bulletin 586 requiring a written rejection, this regulation was not effective when the policy in *Glover* had been written. On the Federal court level, the Fifth Circuit Court, in *Harris v. United States Fidelity & Guar. Co.*, 569 F.2d 850 (5th Cir. 1978), had previously upheld the regulation but the *Glover* court noted that no state court had yet considered its validity. *Glover*, 363 So. 2d at 13. Following *Glover* and *Harris* there was a wide split of authority on this issue. A number of courts elected to mandate a written requirement. See *Decker v. Great Am. Ins. Co.*, 392 So. 2d 965, 966 (Fla. 2d Dist. Ct. App. 1980), *petition for rev. denied*, 399 So. 2d 1143 (Fla. 1981); *Cohen v. American Home Assurance Co.*, 367 So. 2d 677 (Fla. 3d Dist. Ct. App. 1979), *cert. denied*, 378 So. 2d 342 (Fla. 1979); *American Motorist Ins. Co. v. Wein-*

sponse to an ambiguity in the statute. For several years preceding this amendment courts throughout the state were divided on the issue of whether an oral rejection was statutorily sufficient. The amendment also expanded upon the notice requirements originally set forth in the 1980 amendment and further required that the insurer annually notify the insured of the availability of uninsured motorist coverage and the new excess coverage. Additionally, the Act created a new coverage referred to as "Excess Underinsured Motorist Coverage."<sup>31</sup> As long as the insured has damages to justify recovery, he may collect the entire amount of his excess underinsured coverage in addition to, but not reduced by, the other party's liability coverage. This coverage is a type of uninsured motorist coverage but is not to be construed as uninsured motorist coverage on excess policies. Lastly, the Act extended the period offering protection against the insolvency of the liability insurer from one year to four years to conform with the statute of limitations for negligence.<sup>32</sup>

#### IV. Practices Which Frustrate the Statutory Purpose

Pursuant to Florida Statutes section 627.727, uninsured motorist coverage is included in every auto liability policy unless it is specifically rejected in clear terms by an insured named in the policy.<sup>33</sup> However,

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garten, 355 So. 2d 821 (Fla. 1st Dist. Ct. App. 1978); *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978). Other courts did not require a written rejection where the absence of coverage was not disputed by the insurance carrier and the contracting insured. *See Del Prado v. Liberty Mut. Ins. Co.*, 400 So. 2d 115 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. dismissed*, 407 So. 2d 1105 (Fla. 1981); *Liberty Mut. Ins. Co. v. Wright*, 406 So. 2d 1261 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. denied*, 413 So. 2d 877 (Fla. 1982). Many courts followed the lead of *Glover*. *See Kimbrell v. Great Am. Ins. Co.*, 420 So. 2d 1086, 1088 (Fla. 1982), *aff'd*, 428 So. 2d 254 (Fla. 1982); *Lane v. Waste Management Inc.*, 432 So. 2d 70 (Fla. 4th Dist. Ct. App. 1983); *Richmond v. Liberty Mut. Ins. Co.*, 420 So. 2d 360 (Fla. 5th Dist. Ct. App. 1982), *petition for rev. denied*, 426 So. 2d 28 (Fla. 1983); *Travelers Ins. Co. v. Spencer*, 397 So. 2d 358 (Fla. 1st Dist. Ct. App. 1981). It is relevant to note that in *Del Prado v. Liberty Mut. Ins. Co.*, 400 So. 2d at 115, the court stated that if there was a "statutory or other administratively imposed obligation to secure a written rejection, certainly the named insured can waive this requirement which was designed for its protection. Statutory rights can be waived." *Id.* at 116.

31. 1982 Fla. Laws ch. 82-243 at 627.727(4).

32. *Id.* at 627.727(2).

33. FLA. STAT. § 627.727 (Supp. 1982). *See Weathers v. Mission Ins. Co.*, 258 So. 2d 277 (Fla. 3d Dist. Ct. App. 1972). This rule applies to excess or umbrella poli-

aside from requiring the rejection to be in writing, the statute provides no guidelines for determining what is a valid waiver or rejection of this coverage. Based on judicial interpretation, a rejection by a named insured must be knowingly made to meet the requirements of the statute.<sup>34</sup> As evidenced by the abundant and confusing case law on the issue of these rejections, the courts are unable to consistently discern what exactly is a statutorily valid rejection. Absent additional clarification, the issue as to what constitutes an informed or knowing rejection is hopelessly unclear.

### A. Elements of a Knowing Waiver

In uninsured motorist cases, the statutory rejection of uninsured motorist coverage is also referred to as a waiver of such coverage. A waiver is comprised of certain basic elements. The traditional definition of a waiver is "the intentional or voluntary relinquishment of a known right."<sup>35</sup> Therefore, one waiving a right must do so on his own accord, in the exercise of free choice, and with knowledge of the nature of the waived privilege. Consequently, the validity of the waiver or rejection necessarily relates to the content and the adequacy of the offer. "There can be no informed rejection in the absence of an informing offer."<sup>36</sup> If an insured "selects" lower limits of uninsured motorist coverage be-

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cies as well. *See* *Sirantoine v. Illinois Employers Ins. of Wausau*, 438 So. 2d 985 (Fla. 3d Dist. Ct. App. 1983); *Chicago Ins. Co. v. Dominguez*, 420 So. 2d 882 (Fla. 2d Dist. Ct. App. 1982), *petition for rev. denied*, 430 So. 2d 450 (Fla. 1983); *American Motorists v. Bennett*, 415 So. 2d 897 (Fla. 3d Dist. Ct. App. 1982); *Aetna Casualty & Sur. v. Fulton*, 362 So. 2d 364 (Fla. 4th Dist. Ct. App. 1978); *Aetna Casualty & Sur. Co. v. Green*, 327 So. 2d 65 (Fla. 1st Dist. Ct. App. 1976), *cert. denied*, 336 So. 2d 1179 (Fla. 1976).

34. FLA. STAT. § 627.727 (Supp. 1982). Judicial interpretation of the statutory rejection requires it to be informed or knowingly made. *See* *Government Employees Ins. Co. v. Mitchell*, 433 So. 2d 579 (Fla. 5th Dist. Ct. App. 1983); *Realin v. State Farm & Casualty*, 418 So. 2d 431 (Fla. 3d Dist. Ct. App. 1982); *Spaulding v. American Fire & Indem. Co.*, 412 So. 2d 367 (Fla. 4th Dist. Ct. App. 1981); *Brown v. American Motorists Ins. Co.*, 368 So. 2d 597 (Fla. 1st Dist. Ct. App. 1978), *cert. denied*, 368 So. 2d 1363 (Fla. 1979); *Wilson v. National Indem. Co.*, 302 So. 2d 141 (Fla. 1st Dist. Ct. App. 1974).

Generally, a knowing rejection is a factual issue for the jury. *Petrou v. South Carolina Ins. Co.*, 435 So. 2d 316 (Fla. 4th Dist. Ct. App. 1983).

35. BLACK'S LAW DICTIONARY 1751 (4th ed. 1968).

36. *Spaulding v. American Fire & Indem. Co.*, 412 So. 2d at 371, *quoted in* *Realin v. State Farm Fire & Casualty Co.*, 418 So. 2d at 432; *Lustig v. Colonial Penn Ins. Co.*, 406 So. 2d 543, 544 (Fla. 4th Dist. Ct. App. 1982).

cause the insurer failed to offer a higher amount equal to the liability coverage and the insurer concedes it would not write the policy for the higher amount even if requested, it can not be said that the rejection was voluntary.<sup>37</sup> In these situations, the insured is not only uninformed but is also deprived of his freedom of choice and is forced to accept the policy on the insurer's terms or have no coverage at all. Thus, "take it or leave it" offers by insurers cannot be met with statutory valid rejections by insureds.<sup>38</sup> Likewise, if the insurer furnishes the insured with false information as to the nature of the coverage, the purported rejection is ineffective.<sup>39</sup>

## B. Failure of Insurer to Explain Coverage

A large percentage of laypersons applying for auto liability insurance have very little or no knowledge as to the nature and importance of uninsured motorist protection. To many insureds, this vague and uncertain coverage simply means payment of an extra premium. Absent a full and adequate oral or written explanation by the insurer, the insured too often blindly rejects this valuable and relatively inexpensive coverage.<sup>40</sup>

The Florida courts have been reluctant to respond to this problem. In *Lopez v. Midwest Mutual Insurance Co.*,<sup>41</sup> a fifteen year old minor sued to rescind a written rejection of uninsured motorist coverage executed by him as part of an insurance application. The plaintiff claimed that the rejection was ineffective because he did not understand the coverage involved, and because it was not explained to him. The waiver provision in the application did not contain language which defined or apprised the insured of the protection he was waiving, but was merely a

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37. *Aetna Casualty & Sur. Co. v. Fulton*, 362 So. 2d at 364.

38. *Id.* at 365.

39. *Wilson v. National Indem. Co.*, 302 So. 2d at 141.

40. Frequently uninsured motorist waiver provisions are short statements on the insurer's form reciting the relevant portion of the uninsured motorist statute requiring this protection unless rejected. The voluminous case law on this issue indicates the widespread confusion present in the judiciary in interpreting the statutory language. Arguably it is unreasonable to expect an ordinary insured to adequately understand this legislation and its extensive ramifications based on this technically formal language found in most applications.

41. *Lopez v. Midwest Mut. Ins. Co.*, 223 So. 2d 550 (Fla. 3d Dist. Ct. App. 1969).

single statement of rejection.<sup>42</sup> The Third District Court of Appeal ruled in favor of the insurance company, stating that "the insurance company has no duty to explain uninsured motorist coverage to an insurance applicant unless the applicant asks for an explanation."<sup>43</sup>

Other states have responded to this situation by either judicially or statutorily adopting certain objective standards to ensure a more knowing rejection. For example, some courts have held that the rejection should contain a definition of uninsured motorist coverage which will "clearly and specifically apprise the insured of the nature of the right he is relinquishing"<sup>44</sup> in plain terms understandable to the layperson. A single line on the carrier's form was held insufficient on its face to fulfill the requirement of a valid rejection.<sup>45</sup> Other courts simply require the rejection to expressly refer to the concept of uninsured motorist protection.<sup>46</sup> The judicial rulings most effective to protect the insured are those which require the insurer to orally explain the coverage and record the substance of the conversation as evidence.<sup>47</sup>

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42. A block near the bottom of the application stated: "UNINSURED MOTORIST COVERAGE: MUST BE INCLUDED WITH LIABILITY OR PACKAGE POLICY AT ADDITIONAL PREMIUM OF \$10.00, UNLESS REJECTED." The applicant was to sign for the total premium. Above the line for signature were the words: "IN APPLYING FOR THIS INSURANCE I SPECIFICALLY REJECT INSURED MOTORIST COVERAGE, UNLESS INCLUDED IN THE PREMIUM ABOVE." *Id.* at 551.

43. *Id.* at 552. The *Lopez* rule has been followed in a number of other cases. See *Realin v. State Farm Fire & Casualty Co.*, 418 So. 2d 431 (Fla. 3d Dist. Ct. App. 1982); *General Accident Fire & Life Assurance Ltd. Corp. v. MacKenzie*, 410 So. 2d 558 (Fla. 4th Dist. Ct. App. 1982), *petition for rev. denied*, 419 So. 2d 1197 (Fla. 1982); *General Ins. Co. of Florida v. Sutton*, 396 So. 2d 855 (Fla. 3d Dist. Ct. App. 1982); *Alejano v. Hartford Accident & Indem. Co.*, 378 So. 2d 104 (Fla. 3d Dist. Ct. App. 1979); *Auto Owner's Ins. Co. v. Yates*, 368 So. 2d 634, 638 (Fla. 2d Dist. Ct. App. 1979), *cert. denied*, 378 So. 2d 351 (Fla. 1979).

44. *Dufresne v. Elite Ins. Co.*, 26 Cal. App. 3d 916, 924, 103 Cal. Rptr. 347, 352 (1972). See *Bohlert v. Spartan Ins. Co.*, 3 Cal. App. 3d 113, 83 Cal. Rptr. 515 (1969); *Johnson v. Concord Mut. Ins. Co.*, 450 Pa. 614, 300 A.2d 61, 65 (1973). For similar statutory requirements, see CAL. INS. CODE § 11580.2(a)(2) (Deering Supp. 1983); DEL. CODE ANN. tit. 18, § 3902(a) (Supp. 1982); IOWA CODE ANN. § 516A.1 (West Supp. 1983); MICH. COMP. LAWS ANN. § 500.3010 (repealed October 1, 1973 by no fault law).

45. *Johnson v. Concord Mut. Ins. Co.*, 300 A.2d at 61.

46. *Aldcroft v. Fidelity & Casualty of New York*, 106 R.I. 311, 259 A.2d 408 (1969).

47. See *Dufresne v. Elite Ins. Co.*, 26 Cal. App. 3d 916, 103 Cal. Rptr. 347 (1972); *Hagar v. Elite Ins. Co.*, 22 Cal. App. 3d 505, 99 Cal. Rptr. 423 (1971). See also *Johnson v. Concord Mut. Ins. Co.*, 300 A.2d 61 (1973).

The Florida courts have not implemented any rule requiring an insurer to explain this coverage and the *Lopez* holding is still followed.<sup>48</sup> Furthermore, the present statute imposes a duty on the insurer only to inform the insured of his statutory options regarding the amount of uninsured motorist coverage.<sup>49</sup>

### C. Mistaken Assumptions, Slanted Policies, and Exclusions

While providing an element of choice, the statutory opportunity to reject uninsured motorist coverage simultaneously fosters many potential pitfalls for the insurance applicant. For example, insureds are often under the mistaken impression that an insurance broker is an agent of the insurance company. The general rule is that an insurance broker is the agent of the insured rather than the insurer even though the broker receives compensation out of the premium from the insurer.<sup>50</sup> Thus, even if the broker improperly rejects coverage<sup>51</sup> or selects lower limits in signing for the insurance,<sup>52</sup> the insured is still bound by the rejection regardless of whether the signature was authorized.

Another trap for insureds may lie in the policy application itself. Frequently, insurance applications are slanted to discourage the purchase of uninsured motorist coverage or to limit its scope by exclusions.<sup>53</sup> A common method used is to describe the coverage as "additional" insurance requiring an "additional" premium. In *Lopez*,<sup>54</sup> the

48. See *supra* note 43.

49. FLA. STAT. § 627.727 (Supp. 1982). *Travelers Ins. Co. v. Spencer*, 397 So. 2d 358 (Fla. 1st Dist. Ct. App. 1981). If the insured has contracted for insurance in amounts less than the highest limits available, it must be shown that he was offered the higher limits in order for him to have effectively rejected them. *Realin v. State Farm Fire & Casualty Co.*, 418 So. 2d 431 (Fla. 3d Dist. Ct. App. 1982). "The application, by itself, is not evidence that the higher limits were offered." *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d 1169, 1170 (Fla. 5th Dist. Ct. App. 1982); *American Motorist Ins. Co. v. Weingarten*, 355 So. 2d 821 (Fla. 1st Dist. Ct. App. 1978). But see *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978).

50. *Empire Fire & Marine Ins. Co. v. Koven*, 402 So. 2d 1352 (Fla. 4th Dist. Ct. App. 1981); *Auto Owner's Ins. Co. v. Yates*, 368 So. 2d 634 (Fla. 2d Dist. Ct. App. 1979), *cert. denied*, 378 So. 2d 351 (Fla. 1979).

51. *Empire Fire & Marine Ins. Co. v. Koven*, 402 So. 2d at 1352.

52. *Auto Owner's Ins. Co. v. Yates*, 368 So. 2d at 634.

53. 2 I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE*, § 23.04(3) at 23-12, 23-13 (revised ed. 1983).

54. *Lopez v. Midwest Mut. Ins. Co.*, 223 So. 2d 550 (Fla. 3d Dist. Ct. App. 1969).



application in issue contained several boxes which could be checked by the applicant to select the coverages desired. An additional block at the bottom of the application had to be checked if uninsured motorist coverage was requested. Furthermore, the insured himself was required to add the additional premium for the uninsured motorist coverage to the package policy applied for.<sup>55</sup>

The Third District Court of Appeal acknowledged that these provisions encouraged the applicant to order insurance without the uninsured motorist coverage and that the provisions demonstrated to the applicant that he would pay less by rejecting the coverage. The *Lopez* court stated that the provisions would better effectuate the purpose of the statute if the premium and the uninsured motorist coverage were added automatically (unless a rejection were made), but upheld the rejection in the absence of statutory language requiring such provisions.<sup>56</sup> The court commented that regulation of insurance companies, including the establishment of requirements concerning the provisions of insurance applications, is not primarily a concern of the judicial branch of government.<sup>57</sup> The court's attitude in *Lopez* is typical of the unwillingness of the judiciary to become involved in devising regulations and standards that might better protect the insured and effectuate the purpose of the statute.

This judicial reluctance was also evident in the more recent case of *Daly v. Industrial Fire & Casualty Insurance Co.*<sup>58</sup> In *Daly*, the insurer's standard underwriting practice was to prepare a form for the applicant's signature, on which form the uninsured motorist coverage was already rejected. This was done prior to any discussion with the applicant and required him "to reject the rejection"<sup>59</sup> if this coverage was desired. The Fourth District Court of Appeal upheld the rejection but stated that this practice violated the intent of the statute and appealed to the Department of Insurance and the legislature for attention to this matter.<sup>60</sup> A response to these situations from such agencies is certainly warranted. In the interim, the courts should hold similar prac-

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Daly v. Industrial Fire & Casualty Ins. Co.*, 422 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1982). For another example of a "less than above board technique" used by the insurer, see *Realin v. State Farm Fire & Casualty Co.*, 418 So. 2d 431 (Fla. 3d Dist. Ct. App. 1982).

59. *Daly*, 422 So. 2d at 1094.

60. *Id.*

tices and provisions void as contrary to public policy and the intent of the statute.

Insurance policies often attempt to exclude from uninsured motorist coverage certain individuals<sup>61</sup> and vehicles.<sup>62</sup> The exclusions are often couched in fine print and ambiguous language. In these cases, courts should not read them as to exclude coverage. The purpose of the statute is to protect persons injured by uninsured motorists who are unable to make the injured party whole.<sup>63</sup> The protection is designed for the injured or damaged person and not for the benefit of insurance companies or negligent motorists.<sup>64</sup> In light of this purpose, courts must avoid a construction of the statute which would defeat coverage.<sup>65</sup> Furthermore, they must liberally construe policies in favor of the policyholder, and strictly construe them against the insurer.<sup>66</sup>

## V. "Full Coverage"

Another serious problem occurs when the insured claims he requested "full coverage."<sup>67</sup> To most insureds, "full coverage" means un-

61. *Salas v. Liberty Mut. Ins. Co.*, 272 So. 2d 1 (Fla. 1972); *Mullis v. State Farm Mutual Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971); *Liberty Mut. Ins. Co. v. Marino*, 370 So. 2d 397 (Fla. 3d Dist. Ct. App. 1979); *Forbes v. Allstate Ins. Co.*, 210 So. 2d 244 (Fla. 3d Dist. Ct. App. 1968); *First Nat'l. Ins. Co. of America v. Devine*, 211 So. 2d 587 (Fla. 2d Dist. Ct. App. 1968).

62. *Progressive Am. Ins. Co. v. Glenn*, 428 So. 2d 367 (Fla. 3d Dist. Ct. App. 1983); *Travelers Ins. Co. v. Spencer*, 397 So. 2d 358 (Fla. 1st Dist. Ct. App. 1981); *Hartford Accident & Indem. Co. v. Mason*, 210 So. 2d 474 (Fla. 3d Dist. Ct. App. 1968).

63. *Brown v. Progressive Mut. Ins. Co.*, 249 So. 2d 429 (Fla. 1971).

64. *Id.* at 430.

65. *First National Ins. Co. of Am. v. Devine*, 211 So. 2d 587 (Fla. 2d Dist. Ct. App. 1968).

66. *Stuyvesant Ins. Co. v. Butler*, 314 So. 2d 567 (Fla. 1975); *National Merchandise Co. Inc., v. United Service Auto Ass'n*, 400 So. 2d 526, 530 (Fla. 1st Dist. Ct. App. 1981); *Zautner v. Liberty Mut. Ins. Co.*, 382 So. 2d 106, 107 (Fla. 3d Dist. Ct. App. 1980); *Quick v. National Indem. Co.*, 231 So. 2d 22 (Fla. 4th Dist. Ct. App. 1970).

67. *General Ins. Co. of Florida v. Sutton*, 396 So. 2d 855 (Fla. 3d Dist. Ct. App. 1981); *MacKenzie v. Avis Rent-a-Car Systems Inc.*, 369 So. 2d 647 (Fla. 3d Dist. Ct. App. 1979), *cert. denied*, 379 So. 2d 202 (Fla. 1979), *Riccio v. Allstate Ins. Co.*, 357 So. 2d 420 (Fla. 3d Dist. Ct. App. 1978); *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978); *United States Fidelity & Guar. Co. v. Darden*, 338 So. 2d 37 (Fla. 3d Dist. Ct. App. 1976), *cert. dismissed*, 353 So. 2d 680 (1977), *Garcia v. Allstate Ins. Co.*, 327

insured motorist coverage in an amount at least equal to the liability coverage. However, cases indicate that when the insured requests full coverage, the insurer often omits the uninsured motorist coverage from the policy. An insured's mistaken belief that he has this coverage is sometimes reinforced by a coincidental increase in the policy premium. Generally, the insured is ignorant of the fact that he is not covered because when he signs the contract for coverage he is often unaware that he is also rejecting the uninsured motorist coverage.<sup>68</sup>

The law is unsettled on the question of whether a request for full coverage will render the insurer liable for the optional uninsured or underinsured coverages. A Kentucky court of appeal has held that a request for full coverage did not require the insurer to provide the optional coverages.<sup>69</sup> The Kentucky uninsured motorist statute, like the Florida statute, only required the insurer to provide the additional coverage when requested by the insured. The court held that the request lacked specificity since there were numerous types of optional coverages available such as fire, theft, or towing.<sup>70</sup> Nevertheless, this case has been strongly criticized because the court failed to distinguish a request for the aforementioned peripheral optional coverages, which lack the public policy interest in encouraging their purchase, from a request for optional uninsured motorist coverages included in the statutory financial responsibility scheme.<sup>71</sup> A request for the former unrelated coverages would not obligate the insurer to furnish them.<sup>72</sup> However, as one commentator has stated, public policy concerns would support a finding that a request for full coverage would require the inclusion of the optional uninsured and underinsured coverages.<sup>73</sup>

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So. 2d 784 (Fla. 3d Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 422 (Fla. 1977).

68. See, e.g., *General Ins. Co. of Florida v. Sutton*, 396 So. 2d 855. Such a situation also raises the issue of the applicant's duty to read. Generally, "an applicant may not contest his signed rejection of coverage by contending that he signed the rejection without reading it." *Id.* at 856. See also *Barnes v. Mangham*, 153 Ga. App. 540, 265 S.E.2d 867 (1980). Arguably, in many cases the insurer never offered the coverage and thus the applicant's failure to read the application or policy and discover the absence of the coverage is immaterial. Additionally, certain waiver provisions are not adequate to apprise the insured of the nature of the coverage and thus the insured cannot knowingly reject the protection.

69. *Flowers v. Wells*, 682 S.W.2d 179 (Ky. App. 1980).

70. *Id.* at 180, 181.

71. 2. I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE*, § 23.04(2) at 23-21. (revised ed. 1983).

72. *Id.*

73. *Id.* Cf. *Parker v. Amica Mut. Ins. Co.*, 395 A.2d 507, 510 (N.H. 1978).

The interpretation of "full coverage" was an issue presented in *Riccio v. Allstate Insurance Co.*; <sup>74</sup> the Florida Third District Court of Appeal reversed a directed verdict in favor of the plaintiff's insurer in an action for a declaratory decree. The court held that a jury question was presented as to whether the insurer's undertaking to give the insured full coverage included an obligation to provide uninsured motorist coverage. However, in dictum, the court stated that pursuant to the 1972 statute that required uninsured motorist coverage in an amount up to 100% of the liability insurance, full coverage would mean uninsured motorist coverage equal to the liability limits. <sup>75</sup>

In the recent case of *Miller v. Liberty Mutual Ins. Co.*, <sup>76</sup> the plaintiff's employer had instructed its insurer to "fully cover" the leased vehicles which the employees used in their business. Following the accident, the total amount of uninsured motorist' coverage was determined to be only \$10,000. since the employer had limited this coverage to \$10,000/\$20,000. without notifying its employees. The Third District Court of Appeal reversed a summary judgment in favor of the insurer and interpreted the phrase "fully covered" as including the "maximum limit of uninsured motorist coverage available under the statutes of this state which under the particular policy, . . . would be \$500,000." <sup>77</sup>

Other states have adopted certain practices which can be used to eliminate these problems. For example, statutory requirements have

74. *Riccio v. Allstate Ins. Co.*, 357 So. 2d 420 (Fla. 3d Dist. Ct. App. 1978).

75. *Id.* at 422. This particular statute gave rise to some controversy over the phrase "in an amount up to one hundred percent of the liability limits." *Id.* at 422, 423. While *Riccio* interpreted this to mean uninsured motorist coverage equal to the bodily injury limits, the court in *Garcia v. Allstate Ins. Co.*, 327 So. 2d 784 (Fla. 3d Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 422 (Fla. 1977), held that "full coverage" was any amount of uninsured motorist coverage *between* the financial responsibility limits and the bodily injury limits; one being a minimum, the other a maximum. In light of the 1973 amendment clarifying the coverage requirements, *Riccio* is the correct interpretation. That statute, as well as the present one, requires uninsured motorist coverage *not less* than the bodily injury limits. The present statute, however, requires the insurer to make available limits up to \$100,000/\$300,000 irrespective of the amount of bodily injury limits purchased if requested in writing. FLA. STAT. § 627.727 (Supp. 1982). Although *Riccio* was remanded for a jury trial on this issue, the court's dictum interpreting the meaning of "full coverage" should be given weight under the language of the present statute.

76. *Miller v. Liberty Mut. Ins. Co.*, 438 So. 2d 939 (Fla. 3d Dist. Ct. App. 1983).

77. *Id.*

been imposed mandating that the coverage shall be called to the attention of the named insured at the time the policy is issued.<sup>78</sup> Some California courts require the waiver agreement to be entirely separate from the policy and require an additional signature on the agreement.<sup>79</sup> These rulings evidence judicial approval and encouragement of the purchase of uninsured motorist protection and a desire to ensure that the applicant is aware of all his rights and understands the consequences of his actions.

## VI. Available Optional Coverages

The Florida uninsured motorist statute provides that "the insurer shall make available, at the written request of the insured, limits of up to \$100,000 each person, \$300,000 each occurrence, irrespective of the limits of bodily injury liability purchased."<sup>80</sup> This is an optional coverage which is included in many of the states' uninsured motorist statutes. Once again, the Florida statute offers little from which one can discern the respective rights and duties of the insured and insurer as conferred by this provision.

Where a statute requires the insured to request the optional coverage from the insurer, it is logical to "read into the statute an assumption that the insurer must first advise the insured that such coverage is available."<sup>81</sup> This analysis would avoid placing an undue burden on the insured to keep apprised of changes in insurance legislation. Once informed of the optional coverage, the insurer should obtain a written rejection if the insured chooses not to select the additional limits. However, if the insurer fails to make known to the insured the availability of the increased limits, the issue is whether the insured will automatically be entitled to the optional coverage. A determination that such coverage would be included would be consistent with the intent of the statute. Nevertheless, the Fourth District Court of Appeal in *Lustig v. Colonial Penn Insurance*<sup>82</sup> indicated that such a finding would not be

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78. ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1983). See *Koenig v. Mission Ins. Co.* 106 Ariz. 75, 471 P.2d 271 (1970), *Maryland Casualty Co. v. Wilson*, 6 Ariz. App. 470, 433 P.2d 650 (1967).

79. See, e.g., *Hendricks v. Meritplan Ins. Co.* 205 Cal. App. 2d 133, 22 Cal. Rptr. 682 (1962).

80. FLA. STAT. § 627.727 (Supp. 1982).

81. 2 I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE*, § 23.04(1) at 23-20 (revised ed. 1983).

82. *Lustig v. Colonial Penn Ins. Co.*, 406 So. 2d 543 (Fla. 4th Dist. Ct. App.

the proper result. In *Lustig*, the insurer provided the insured with a brochure which indicated that the uninsured motorist coverage could not be higher than the bodily injury limits which were \$50,000./\$100,000. The insured was not informed that uninsured motorist limits of \$100,000./\$300,000. were available upon written request. The court observed that despite the insurer's error, this would not entitle the insured to a judgment finding his coverage to be \$100,000./\$300,000. without a written request, or without a showing that the coverage would not have been provided even if requested.<sup>83</sup>

Many states' statutes have been interpreted to impose a duty on the insurer to inform the insured of the availability of the optional coverage.<sup>84</sup> This explanation should contain information regarding the advantages, nature, and scope of the optional coverage, as well as its purpose and the cost it would entail. Even absent a statutory requirement to communicate this information to the insured, it has been held that the insurer has a duty to "make a commercially reasonable attempt to explain the availability and operation of such coverage to their insureds."<sup>85</sup>

Additionally, while there are no cases to date, the new statutory requirement of written rejections should equally apply to rejections of the optional coverage. Because the statute requires that the insurer "shall make available" limits in excess of the standard coverage upon written request, he is once again in the position of the offeror. Therefore, it is arguable that once the insurer offers the optional coverage and the insured elects not to contract for the higher amount, the insurer should still secure a written rejection to satisfy the statute. Absent a written rejection, the insured should be entitled to the maximum coverage allowed by the law.

## VII. Persons With Statutory Authority to Reject

The Florida uninsured motorist statute contains a provision rendering the requirement of uninsured motorist coverage inapplicable

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1981).

83. *Id.* at 544 n.2.

84. *See, e.g.,* DEL. CODE ANN. § 3902(b) (Supp. 1982); OKLA. STAT. ANN. § 3636(F) (Supp. 1983). *See also* 2 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE, § 23.04(1) at 23-18 (revised ed. 1983).

85. 2 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE, § 23.04(3) at 23-23 (revised ed. 1983) (quoting *Smedvig v. St. Paul Ins. Co., Henn. County Dist. Ct. (Minn. 2/9/80)*, file No. 745876 (Per Hon. Wm. S. Posten)).

when any insured named in the policy rejects the coverage in writing.<sup>86</sup> In interpreting the statute, courts have drawn a distinction between the designation "persons insured thereunder" and "named insured" or "insured named."<sup>87</sup> The section of the statute creating coverage contains the phrase "persons insured thereunder" which as interpreted has a broad meaning to extend coverage. On the other hand, that portion of the statute authorizing rejection uses the term "any insured named" which has a very limited meaning and is only applicable to those persons named in the policy.<sup>88</sup> Courts have tended to liberally construe the former portion regarding the extent of coverage and to narrowly construe the latter portion regarding rejection, as it detracts from public policy considerations.<sup>89</sup>

Thus, the named insured alone has the power to accept or reject the uninsured motorist coverage. Furthermore, "the decision of the named insured accepting or rejecting uninsured motorist coverage is binding on any additional insureds under the policy."<sup>90</sup> This rule has been viewed as simply practical in light of the waiver problem; to hold otherwise would require the insurer to obtain rejections from all additional insureds and permissive users.<sup>91</sup> While this analysis may be valid, the rule nevertheless works a hardship on those additional insureds who assume the existence of this coverage. When injured, these insureds suddenly discover that this protection has been waived by the policy holder.

The statute contains no provisions for notice to the additional insureds; therefore, there is no duty to communicate a waiver of the uninsured motorist protection to additional insureds.<sup>92</sup> Generally, in a family situation, this will not pose much of a problem because of the close relationship. There is a likelihood that a consensus was reached among

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86. FLA. STAT. § 627.727 (Supp. 1982).

87. *Weathers v. Mission Ins. Co.*, 258 So. 2d 277 (Fla. 3d Dist. Ct. App. 1966); *Kohly v. Royal Indem. Co.* 190 So. 2d 819 (Fla. 3d Dist. Ct. App. 1966), *cert. denied*, 200 So. 2d 813 (Fla. 1967).

88. *Weathers v. Mission Ins. Co.*, 258 So. 2d at 277; *Kohly v. Royal Indem. Co.*, 190 So. 2d at 819.

89. *See, e.g., Protective v. National Ins. Co. of Omaha v. McCall*, 310 So. 2d 324 (Fla. 3d Dist. Ct. App. 1975); *Weathers v. Mission Ins. Co.*, 258 So. 2d at 277.

90. *Whitten v. Progressive Casualty Ins. Co.* 410 So. 2d 1086 (Fla. 1982).

91. 12-A G. COUCH, *CYCLOPEDIA OF INSURANCE LAW*, § 45:627 (2d ed. 1981).

92. *Darnaby v. Greenstein Trucking Co.*, 425 So. 2d 656 (Fla. 4th Dist. Ct. App. 1983); *Guardado v. Greyhound Rent-A-Car*, 340 So. 2d 510 (Fla. 3d Dist. Ct. App. 1976).

the insureds in the selection of coverage or there is at least an awareness as to the contents of the policy.<sup>93</sup> However, in a commercial setting the rule can have unfair results. The most common cases involve corporations and car rental agencies. In the former instance, employers frequently waive the protection for their employees who are usually engaged in an occupation requiring the use of a vehicle. In the car rental situations, the rented vehicle is typically insured for liability, but lessees are commonly unaware that uninsured motorist coverage has been previously rejected by the lessor.<sup>94</sup> Since the waiver is typically not communicated to the employee or lessee, there is not an opportunity for the individual to obtain additional protection through an agreement with the named insured or through a collateral policy. Once again, the usual judicial response is to acknowledge the problem but to avoid ruling on the issue, instead calling for legislative action.<sup>95</sup>

Arguably, in the absence of requirements for communication of the rejection and guidelines for the form of notification, the logical alternative to eliminating this and numerous other problems plaguing the rejection issue is to eliminate the right to reject entirely.<sup>96</sup> Courts have stated that "[t]he statute does not contemplate a piecemeal whittling away of liability for injuries caused by uninsured motorists,"<sup>97</sup> yet apparently this is exactly what is happening. Mandatory coverage may be the best solution to preserving the original purpose and intent of this

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93. *Lancaster Oil Co. Inc. v. Hartford Accident & Indem. Co.*, 486 F.Supp. 399 (N.D. Fla. 1980); *Del Prado v. Liberty Mut. Ins. Co.*, 400 So. 2d 115 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. dismissed*, 407 So. 2d 1105 (Fla. 1981); *Maxwell v. United States Fidelity & Guar. Co.*, 399 So. 2d 1051 (Fla. 1st Dist. Ct. App. 1981); *Continental Ins. Co. v. Roth*, 388 So. 2d 617 (Fla. 3d Dist. Ct. App. 1980); *Glover v. Aetna Ins. Co.*, 363 So. 2d 12 (Fla. 1st Dist. Ct. App. 1978).

94. *Darnaby v. Greenstein Trucking Co.*, 425 So. 2d at 656; *Guardado v. Greyhound Rent-A-Car*, 340 So. 2d at 510; *Kohly v. Royal Indem. Co.*, 190 So. 2d at 819; *Morpurgo v. Greyhound Rent-A-Car*, 339 So. 2d 718 (Fla. 1st Dist. Ct. App. 1976); *MacKenzie v. Avis Rent-A-Car Systems, Inc.*, 369 So. 2d 647 (Fla. 3d Dist. Ct. App. 1979), *cert. denied*, 379 So. 2d 202 (Fla. 1979).

95. *Kohyl v. Royal Indem. Co.*, 190 So. 2d at 819; *Guardado v. Greyhound Rent-A-Car*, 340 So. 2d at 510. *See also* *Riccio v. Allstate Ins. Co.*, 357 So. 2d 420, 421-422 (Fla. 3d Dist. Ct. App. 1978).

96. *See* A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE at 285 (1970), stating that "so long as the present system is maintained, it seems both justifiable and desirable to eliminate the right to reject this coverage in order to assure protection for those classes of insureds who do not exercise a knowledgeable waiver of the protection." *Id.*

97. *See, e.g., First Nat'l Ins. Co. of America v. Devine*, 211 So. 2d 587, 589 (Fla. 2d Dist. Ct. App. 1968).



statute, namely, to protect insureds who fall victims to negligent and financially irresponsible motorists.

### VIII. What Constitutes Adequate Proof of Rejection?

Generally, whether the insurer offered the applicant the full amount of uninsured motorist coverage and whether the insured has knowingly rejected uninsured motorist protection or opted for coverage in an amount less than his liability limits are issues for the trier of fact.<sup>98</sup> Nevertheless, it is not uncommon for these cases to be resolved by summary judgment or directed verdict without submitting the issue to a finder of fact. For example, in *Travelers Insurance Co. v. Spencer*,<sup>99</sup> the issue before the First District Court of Appeal was what type of evidence was sufficient to raise a genuine issue of material fact as to whether the insurer had met the statutory requirement of offering the insured uninsured motorist coverage. The *Spencer* court stated that “[w]hen a statute commands that its provisions can only be met by following a specific method, and the evidence reveals that its requirements were not observed, summary judgment is appropriately entered because the controversy is considered one of law and not one involving a disputed issue of material fact.”<sup>100</sup> The statute requires an “affirmative, informed rejection by an insured of his right to UM protection.”<sup>101</sup>

Without extrinsic evidence, an informed rejection cannot be implied merely from an insured’s signature on the application for uninsured motorist coverage to lower the limits of this coverage.<sup>102</sup> The court’s opinion in *Southeast Title & Insurance Co. v. Thompson*<sup>103</sup> implies that a rejection of uninsured motorist coverage may be inferred from acceptance by the insured of a policy containing an endorsement

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98. The issue of a knowing selection of uninsured motorist coverage is a matter for the jury and not to be decided by summary judgment. *New Hampshire Ins. Co. v. Conner*, 435 So. 2d 275 (Fla. 2d Dist. Ct. App. 1983).

99. *Travelers Ins. Co. v. Spencer*, 397 So. 2d 358 (Fla. 1st Dist. Ct. App. 1981).

100. *Id.* at 360.

101. *Id.* at 361.

102. *Zisook v. State Farm Mutual Auto. Ins. Co.*, 8 Fla. L. W. 2654 (Fla. 3d Dist. Ct. App. November 11, 1983) (No. 82-1972). *Aetna Casualty & Sur. Co., v. Fulton*, 362 So. 2d 364 (Fla. 4th Dist. Ct. App. 1978); *American Motorist Ins. Co. v. Weingarten*, 355 So. 2d 821 (Fla. 1st Dist. Ct. App. 1978). *See also* *Lumbermen’s Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978).

103. *Southeast Title & Ins. Co. v. Thompson* 224 So. 2d 718 (Fla. 3d Dist. Ct. App. 1969), *rev’d*, 231 So. 2d 201 (Fla. 1970).

which excludes all policy coverage for certain accidents although it does not specifically mention uninsured motorist coverage. Such an implication can be easily avoided by requiring the insured to reject the coverage in specific terms. This would demonstrate that the insured had at least been offered the coverage and would also satisfy the requirement of written rejection.

In *Kimbrell v. Great American Insurance Co.*,<sup>104</sup> the Florida Supreme Court stated that "the making of an express offer . . . is not dispositive of the question of whether there was a knowing selection of coverage limits."<sup>105</sup> The court noted that it may already be within the insured's knowledge that such coverage is available without an express offer by the insurer. Additionally, although it is relevant that the insurer maintains evidence of an offer, it is not critical in determining whether a knowing selection was made.<sup>106</sup>

Frequently, the insurer will attempt to prove a rejection by testimony of his unailing practice to offer uninsured motorist coverage pursuant to Florida Statutes section 627.727, or of his general routine of mailing notices to the policyholder of changes in the law.<sup>107</sup> Such evidence is admissible under the Florida Evidence Code.<sup>108</sup> However, the general rule as set forth in *Jarrard v. Associates Discount Corp.* by the Florida Supreme Court is that:

in order to constitute *proof* of performance of an act on a specific occasion, it is not sufficient merely to prove the habit, practice, or custom, but there must also be proof that the practice was followed in the particular instance in issue, and the evidence should show performance of the practice by those then charged with it.<sup>109</sup>

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104. *Kimbrell v. Great Am. Ins. Co.*, 420 So. 2d 1086 (Fla. 1982), *aff'd*, 428 So. 2d 254 (Fla. 1982).

105. *Id.* at 1088.

106. *Id.* at 1089. *See Liberty Mut. Ins. Co. v. Wright*, 406 So. 2d 1261 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. denied*, 413 So. 2d 87 (Fla. 1982).

107. *Nationwide Mut. Ins. Co. v. Jones* 414 So. 2d 1169 (Fla. 5th Dist. Ct. App. 1982); *Travelers Ins. Co. v. Spencer*, 397 So. 2d at 358; *Aetna Casualty & Sur. Co., v. Fulton*, 362 So. 2d at 364; *American Motorist Ins. Co. v. Weingarten*, 355 So. 2d at 821. *See also Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d at 441.

108. FLA. STAT. § 90.406 (Supp. 1982).

109. *Jarrard v. Associates Discount Corp.* 99 So. 2d 272 (Fla. 1957) (emphasis added). *See also Scatigno v. State Farm Auto. Ins. Co.*, 425 So. 2d 217 (Fla. 2d Dist. Ct. App. 1983); *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d at 1169; *Travelers Ins. Co. v. Spencer*, 397 So. 2d at 358; *American Motorists Ins. Co. v. Weingarten*, 355 So. 2d at 821; *Bernstein v. Liberty Mut. Ins. Co.*, 294 So. 2d 63 (Fla. Dist. Ct. App.

In light of this rule, courts generally hold as a matter of law that the statutory requirements are not met when evidence of a knowing rejection is founded on such testimony of routine practice.<sup>110</sup>

In *Nationwide Mutual Insurance Co. v. Jones*,<sup>111</sup> the Fifth District Court of Appeal went so far as to find that the insurer's testimony of general routine was not only admissible pursuant to the evidence code but was also sufficient proof under the rule in *Jarrard*. Apparently, the only distinguishing factor present in *Nationwide* was that the insurer alleged that, in addition to his custom of advising applicants of such coverage, he was certain that he followed that procedure in that case. He could not recall the exact language of the conversation but was sure he had followed his routine. Thus, because the evidence code does not require corroboration, the court found that this added assertion provided the necessary proof that the practice was followed in the particular instance.<sup>112</sup> The 1982 statute requiring a written rejection will alleviate situations where the question is whether the insured actually rejected the coverage and arguably, such practices should not be permissible.

## IX. Conclusion

The Florida uninsured motorist statute section 627.727 has been considerably expanded over the more than twenty years since its origin in 1961. In the area of rejection of uninsured motorist protection, uncertainty still exists in spite of numerous amendments. Admittedly, the recent 1982 amendment requiring written rejections is a step in the right direction. Although rejections of uninsured motorist coverage must now be in writing, litigation will continue to revolve around the intricacies of the required "knowing rejection." The availability of additional forms of optional coverages and the apparent need to obtain knowing rejections for these coverages as well, will in all likelihood aggravate the problem. Nevertheless, as uninsured motorist litigation maintains its steadily increasing pace, it is obvious that much more legislative and judicial structuring of the rejection procedure is needed. In

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1974).

110. *Travelers Ins. Co. v. Spencer*, 397 So. 2d at 358; *American Motorists Ins. Co. v. Weingarten*, 355 So. 2d at 821. *But see* *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d at 441.

111. *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d at 1169.

112. *Id.* at 1169, 1170.

all cases, it must be remembered that the purpose of the statute is to protect those injured through the negligence of irresponsible motorists. The statute does not inure to the benefit of either the uninsured motorist or the insurer. With the abundant confusion in this area caused by insufficient guidelines governing the offer-rejection procedure, this legislative intent is frustrated too often.

The existence of uninsured motorist coverage in serious accident cases can be crucial. Damages are frequently in the six-digit range and lack of insurance can have devastating effects. Because many misunderstandings between insureds and insurers stem from ignorance and lack of adequate explanations regarding uninsured motorist protection, a statutory duty should be imposed upon the insurer to fully explain this coverage, including its purpose, benefits, and cost. It may be impractical to require an insurer to sacrifice valuable time in order to orally explain the fundamentals of this coverage, however, a written explanation on the insurer's form would be a reasonable alternative. If after reading this explanation the insured had any questions, the insurer would be obligated to help answer his inquiries. Such a requirement would place no undue burden on either party. This requirement could be effected by adoption of the following proposed amendment to Florida Statutes section 627.727:

The coverage under this section shall be determined by a written selection of each coverage signed by any named insured under the policy. This selection of desired coverage shall be contained in a separate agreement in which both the nature and scope of uninsured and underinsured motor vehicle coverage and the options are explained in clear and understandable terms. The agreement shall explain that this coverage gives the insured the same rights as if he had been struck by someone with liability coverage. The agreement shall inform the insured that the benefits of such coverage include compensation for pain and suffering, loss of enjoyment of life, and loss of earning capacity, as well as medical expenses and lost wages. The amounts of the premiums for the available coverages shall also be contained in the insurer's uninsured/underinsured motorist agreement. The agreement shall inform the insured of the available limits of these coverages and, absent a selection to the contrary, shall require the insured to reject each and every coverage option. Additionally, the insured must separately select either, or reject both, uninsured and excess underinsured motorist coverage.

Although legislative amendments can undoubtedly cure part of the

dilemma, this is not an area of purely legislative reform. In order to do full justice to the statute's intent, Florida courts must follow the lead of numerous states that have recognized the chaos and disorder inherent in the statutory right of rejection, and which have implemented reforms to correct the disparities. The task of the judiciary to interpret and apply laws handed down to them in conformity with their expressed purpose has been well established. Thus, when the legislative purpose is clear, courts must resolve cases in a manner which furthers that objective. For example, when it is evident that certain insurance industry methods, such as the use of slanted insurance policies, thwart this legislative intent the judiciary should not hesitate to condemn and invalidate these practices. The courts should not display any reluctance in dealing with this well-acknowledged problem, but should initiate the imposition of standards and restrictions to further ensure the fair and just resolution of the vast amount of uninsured motorist cases. Legislative amendments coupled with judicial cooperation will hopefully lead to more definite meetings of the minds between insured and insurer.

*Karen E. Roselli*

## APPENDIX

**627.727** Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection.

(1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section shall not be applicable when, or to the extent that, any insured named in the policy rejects the coverage in writing. When a motor vehicle is leased for a period of 1 year or longer and the lessor of such vehicle, by the terms of the lease contract, provides liability coverage on the leased vehicle in a policy wherein the lessee is a named insured or on a certificate of a master policy issued to the lessor, the lessee of such vehicle shall have the sole privilege to reject uninsured motorist coverage. Unless the named insured, or lessee having the privilege of rejecting uninsured motorist coverage, requests such coverage in writing, the coverage need not be provided in or supplemental to any other policy which renews extends, changes, supersedes, or replaces an existing policy issued to him by the same insurer, when the named insured or lessee had rejected the coverage in connection with a policy previously issued to him by the same insurer. Each insurer shall at least annually notify the named insured of his options as to coverage required by this section. Such notice shall be part of the notice of premium,

shall provide for a means to allow the insured to request such coverage, and shall be given in a manner approved by the department. The coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured under any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; under automobile medical expense coverages; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident. Only the underinsured motorist's automobile liability insurance shall be set off against underinsured motorist coverage. Such coverage shall not inure directly or indirectly to the benefit of any workers' compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workers' compensation or disability benefits law or similar law.

(2)(a) The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured, or such lower limit complying with the rating plan of the company as may be selected by the named insured; but in any event the insurer shall make available, at the written request of the insured, limits up to \$100,000 each person and \$300,000 each occurrence, irrespective of the limits of bodily injury liability purchased, in compliance with the rating plan of the company.

(b) In addition, the insurer shall make available, at the written request of the insured, excess underinsured motor vehicle coverage, providing coverage for an insured motor vehicle when the other person's liability insurer has provided limits of bodily injury liability for its insured which are less than the damages of the injured person purchasing such excess underinsured motor vehicle coverage. Such excess coverage shall provide the same coverage as the uninsured motor vehicle coverage provided in subsection (1), except that the excess coverage shall also be over and above, but shall not duplicate, the benefits available under the other person's liability coverage. The amount of such excess coverage shall not be reduced by a setoff against any coverage, including liability insurance. An insurer shall not provide both uninsured motor vehicle coverage and excess underinsured motor vehicle coverage in the same policy.

(3) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:

(a) Is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency; or

(b) Has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person.

(4) An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect when the liability insurer of the tortfeasor becomes insolvent within 4 years after such an accident. Nothing herein contained shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to its insureds than is provided hereunder.

(5) Any person having a claim against an insolvent insurer as defined in s. 631.54(5) under the provisions of this section shall present such claim for payment to the Florida Insurance Guaranty Association only. In the event of a payment to any person in settlement of a claim arising under the provisions of this section, the association shall not be subrogated or entitled to any recovery against the claimant's insurer. The association shall, however, have the rights of recovery as set forth in chapter 631 in the proceeds recoverable from the assets of the insolvent insurer.

(6) If an injured person or, in the case of, death, the personal representative agrees to settle a claim with a liability insurer and its insured for the limits of liability, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim against the underinsured motorist insurer, then such settlement agreement shall be submitted in writing to the underinsured motorist insurer, which shall have a period of 30 days from receipt thereof in which to agree to arbitrate the underinsured motorist claim and approve the settlement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release. If the underinsured motorist insurer does not agree within 30 days to arbitrate the underinsured motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release, the injured person or, in the case of death, the personal representative may file suit joining the liability insurer's insured and the underinsured motorist insurer to resolve their respective liabilities for any damages to be awarded; however, in such action, the liability insurer's coverage, shall first be exhausted before any award may be entered against the underinsured motorist insurer, and any such award against the underinsured motorist insurer shall be excess and subject to the provisions of subsection (1). Any award in such action against the liability insurer's insured shall be binding and conclusive as to the injured person and underinsured motorist insurer's liability for damages up to its coverage limits.

(7) The legal liability of an uninsured motorist coverage insurer shall not include damages in tort for pain, suffering, mental anguish, and inconvenience unless the injury or disease is described in one or more of paragraphs (a) through (d) of s.627.737(2).

(8) The provisions of s.627.428 do not apply to any action brought pursuant to this section against the uninsured motorist insurer unless there is a dispute over whether the policy provides coverage for an uninsured motorist proven to be liable for the accident.